PEMBINAAN KSY SDN. BHD.

v.

LIAN SENG PROPERTIES SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. S6-22-192-1988]
11 APRIL 1990

CONTRACT: *Representations - Undue influence - Whether privy to certain arrangements - Quasi-Contractual relationship - Contracts Act 1950, s. 71.*

CIVIL PROCEDURE: *Setting aside - No cause of action - Frivolous, vexatious - Order obtained before defendant entered appearance - Affidavit evidence inadmissible - Same cause of action - sham and frivolous - Rules of the High Court 1980, O. 18 r. 19, O. 42 r. 1(1).*

The plaintiffs, P, were employed by D1 as the main contractor to construct the Kuala Lumpur Plaza complex and secured bridging loans from a consortium of lenders (of which D2 was an agent) and D3. On partial completion of the complex, D1 failed to pay the progress payments. P commenced proceedings in Court for the recovery and an interlocutory judgment was entered against D1 for special damages.

As D1 were not able to pay the judgment sum, construction of the complex came to a standstill. The consortium of lenders and D3, not being able to recover the loans given to D1, carried out negotiations with P whereby P agreed to quantify a final account based on the amount of work completed and the remaining work to complete the construction. P also agreed to execute a lump sum agreement whereby D1 agreed to pay P a sum made up of the judgment sum and costs of the remaining works to be carried out. The lump sum agreement was conditional upon the execution of a sharing formula agreement (SFA) between D1, the consortium of lenders and D3. The SFA was duly executed and P undertook to complete the construction and also agreed to suspend this right to levy execution of the judgment sum against D1 during the duration of the SFA. The proceeds of the sales of the apartment units were paid into the special account in favour of D2 who held the proceeds in trust for the consortium of lenders, D1 and D3. D2 were authorised to make payments from the special account to all parties named in the SFA (which included P) whenever the amount in the special account exceeded RM50,000.

After executing the SFA, D2 realised that D1 had utilised a sum in excess of RM2 million. Upon acquiring this information D2 pressured P to accept a reduced sum of 2.6 million.

P averred that D2 and D3 had by the use of undue pressure, influence and inequality of bargaining positions extracted a letter from P indicating their agreement to accept this lesser sum; P claimed they were entitled to RM5.8 million as the balance sum due to them under the lump sum agreement read together with the SFA.

D2 applied to the Court by way of summons-in-chambers for the setting aside of the order of the Court dated 13 August 1988 and that the statement of claim be struck out and the action against D2 be dismissed on the grounds that the statement of claim disclosed no cause of action. D3 also applied for an order that the statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) on the ground that the statement of claim disclosed no reasonable cause of action against D3, was frivolous and vexatious and an abuse of the process of the Court.

The order dated 13 August 1988 was an *ex parte* order restraining D1 from removing proceeds of sale or assets from the jurisdiction of the Court and ordered D1 and D2 to disclose detailed accounts relating to the monies received into the special account.

Held:

[1] P had no right to the part of the order dated 13 August 1988 in relation to D2 as:

(i) it was obtained before D2 had entered an appearance - (O. 42 r. 1(1) RHC 1980);

(ii) it is disputable whether P has a right to require D2 to be paid under the special account or render detailed accounts of the special account created under the SFA to which P was not a party.

(iii) to direct D2 to render the detailed accounts would amount to discovery of documents pursuant to O. 24 r. 1 of the RHC which could only be carried out after pleadings are closed.

(iv) D2 have not filed any statement of defence as they are contending that P have no cause of action against them. P are therefore not entitled to any order directing D2 to disclose detailed accounts under the said special account.

[2] (a)P's case was grounded on certain representations made by D2 and D3 to induce them to complete the construction of the said Kuala Lumpur Plaza project.

(b) As D2 were grounding their application solely on the contention that the statement of claim disclosed no reasonable cause of action and taking into account the principles in relation to this issue, that:

(i) no affidavit evidence is admissible and

(ii) a cause of action which has some chance of success when the pleadings are considered:

the representation proferred by D2 is a tortious act on D2's part and in inducing P to complete the construction of the complex creates a *quasi*-contractual relationship between D2 and P pursuant to s. 71 of the Contracts Act 1950 particularly when it is for the benefit of the consortium lenders that the project should be completed. Therefore, the statement of claim does disclose some question fit to be adjudicated.

[3] (a)As D3 were also party to the SFA their position is not unlike that of the consortium of lenders and they were instrumental in inducing P to complete the complex and to suspend the execution of the judgement which they had obtained against the D1. P therefore a action in tort or *quasi* contract against D3.

(b) D3 contented that they terminated the SFA but the termination was made after the P's cause of action against D3 had accrued in late 1987 when the parties to the formula SFA refused to pay P from the special account.

(c) D3 are therefore in the same boat as the consortium of lenders and D2 who were at the material time acting as agent for D3.

[D2's and D3's application dismissed.]

Cases referred to:
Drummond-Jackson v. British Medical Association [1970] 1 WLR 688
Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. [1984] 1 CLJ (Rep) 211
Re Gylon [1885] 29 Ch D 834
Redifussion (Hong Kong) Ltd. v. Attorney-General of Hong Kong [1970] AC 1136
Wenlock v. Moloney [1965] 1 WLR 1238

Legislation referred to:
Contracts Act 1950, s. 71
Rules of the High Court 1980, O. 18 r. 19, O. 24 r. 1, O. 42 r. 1(1)

For the plaintiffs - P.S. Gill; M/s. Gill & Tang
For the 1st defendant - Murthi; M/s. Murthi & Partners
For the 2nd defendant - Lim Chor Pee; M/s. Albar, Zulkifli & Yap
For the 3rd defendant - Nitin Nadkarni; M/s. Skrine & Co.

JUDGMENT

Lim Beng Choon J:

In this action the second defendants applied to this Court on 6 September 1988 by way of summons-in-chambers (encl. 9) for an order

(i) that para. (e) of the order of Court dated 13 August 1988 be set aside and an enquiry be held by the Senior Assistant Registrar as to damages sustained by the second defendants as a result of the injunction, and

(ii) that the statement of claim insofar as it was related to the second defendants be struck out and the action against the second defendants be dismissed as it disclosed no cause of action or was otherwise an abuse of the process of the Court.

The third defendants in this action too applied by way of summons-in-chambers on 29 October 1988 (encl. 33) for an order that the statement of claim of the plaintiffs be struck out under O. 18 r. 19 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the Court. The grounds of the application were that the statement of claim disclosed no reasonable cause of action against the 3rd defendant, was frivolous and vexatious and an abuse of the process of the Court. An affidavit in support was filed on the same day (encl. 32).

I shall firstly deal with relief (i) sought by the 2nd defendants. The order of the Court dated 13 August 1988 (encl. 17) referred to by the 2nd defendants was an *ex parte* order primarily to restrain the 1st defendants from removing from the jurisdiction of the Court or otherwise dissipating the net proceeds of the sale of Kuala Lumpur Plaza and also other assets of the 1st defendants not exceeding RM12,903,000. That part of the said order of the Court which concerned the 2nd defendants is para. (e) thereof which directed the 1st and 2nd defendants to disclose detailed accounts relating to the monies received into what the parties described as special account and the manner of the appropriation of the same. I allowed the relief sought by the 2nd defendants for the following reasons. Firstly the plaintiffs had no right to that part of the order as it was obtained even before the 2nd defendants had entered an appearance where O. 42 r. 1(1) clearly states that:

> Where a writ is indorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under this rule.

Secondly as stated in *Re Gylon* [1885] 29 Ch. D. 834 an order will not be made if the defendant can show that there is some preliminary question to be tried. Here the plaintiffs were only suing the 2nd defendants and 3rd defendants for a sum of RM5.881 million on the ground that the plaintiffs were induced into completing the construction of Kuala Lumpur Plaza by the representations made by the 2nd and 3rd defendants indicating that the plaintiffs would be paid that sum claimed. It is disputable whether the plaintiffs have a right to require the 2nd defendants to be paid under the special account let alone to render the detailed accounts of the special account, created under the sharing formula agreement to which the plaintiffs were not a party. That being the case, to direct the 2nd defendants to render the detailed accounts would amount to discovery of documents pursuant to O. 24 r. 1 of the Rules of the High Court 1980 which could only be carried out after pleadings are closed. In the present case the 2nd defendants have not filed any statement of defence as they are contending that the plaintiffs have no cause of action against them. The plaintiffs are therefore not entitled to any order directing the 2nd defendants to disclose detailed accounts under the said special account.

I shall now deal with relief (ii) sought by the 2nd defendants. In considering this matter it is useful for me to bear in mind the definitions of "action" and "a cause of action" as advocated by Lord Diplock in the case of *Redifussion (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1970] AC 1136 where he said:

> 'An action' is an application to a Court to grant to the plaintiff specified relief against the defendant. 'A cause of action' is a state of facts the existence of which entitles the Court to grant to the plaintiff the relief applied for in the action.

In the present case the primary relief sought by the plaintiffs are for the recovery of a sum of RM5.881 million which the plaintiff alleged was due to them pursuant to a lump sum agreement executed between the 1st defendant and the plaintiffs on 22 April 1987 read with the sharing formula agreement executed between the consortium of lenders, (the bridging financiers of the project) of which the 2nd defendants were the agent, and the 3rd defendants, as chargee of the land on which Kuala Lumpur Plaza premises was erected, collectively named as the first party and the 1st defendants as the second party. The case of the plaintiff was grounded on certain representations made by the 2nd and 3rd defendants to induce them to complete the construction of the said Kuala Lumpur Plaza project. In order to appreciate the cause of action relied on by the plaintiffs it is necessary to give a brief account of the events leading to the 1st defendant entering into the lump sum agreement and the subsequent execution of the sharing formula agreement executed between the parties concerned. The events leading to the aforementioned transactions are clearly shown in the averments in the statement of claim of the plaintiffs.

By an agreement in writing dated 14 April 1983 made between the plaintiffs and the 1st defendants, the plaintiffs were employed as the main contractor to construct the Kuala Lumpur Plaza complex for an aggregate contract sum of RM98,200,000. The complex was to be constructed on all those pieces of land held under Lot Nos. 845 to 883 (inclusive) and 955, s. 67, Town of Kuala Lumpur (the said lands). The plaintiffs took bridging loans from a consortium of lenders, (of which the 2nd defendants were the agent) and the 3rd defendants. The loans were secured by various charges and/or debentures in favour of the said consortium and the loan granted by the 3rd defendants was secured by a charge on the said lands. On partial completion of the complex the 1st defendants failed to pay the progress payments as certified by the consulting architect amounting to RM10.529 million. The plaintiffs, therefore, commenced proceeding in the Court for the recovery of the said amount. On

31 March 1987 interlocutory judgment was entered against the 1st defendant for the said amount as special damages leaving general damages, interest and cost to be assessed by the Court. As the 1st defendants were not able to pay the judgment sum the construction of the complex came to a standstill. The consortium of lenders and the 3rd defendants were in a fix as they would not be able to recover the loans given to the 1st defendants and it was not economical to advance further loans to the 1st defendants. They and the 1st defendants therefore carried out a negotiation with the plaintiffs. In the result, the plaintiffs agreed to quantify a final account based on the amount of work previously completed and the balance remaining to be done in order to complete the construction of the complex. Based on the quantification the plaintiffs agreed to execute a lump sum agreement whereby the 1st defendants agreed to pay the plaintiffs a sum of RM26.050 million (made up of the judgement sum of RM10.529 million and the sum of RM15.521 million being the costs of the remaining works to be carried out in respect of the complex). Payments of the lump sum was in accordance with the terms set out in the lump sum agreement executed between the plaintiffs and the 1st defendants on 22 April 1987 together with interest at 9% p.a. on monthly rests. The lump sum agreement was conditional upon the execution of a sharing formula agreement being executed between the 1st defendants and the consortium of lenders and the 3rd defendants' chargee wherein the parties to the sharing formula agreement agreed on account of monies payable to the plaintiffs to pay the sum of RM5 million to the plaintiffs. The sharing formula agreement was duly executed on 29 April 1987. Based on these agreements the plaintiffs undertook to and did complete the construction of the complex and also agreed to suspend their right to levy execution of the judgment sum against the 1st defendants during the duration of the sharing formula agreement. Pursuant to clause 4 of the sharing formula agreement the 2nd defendants as agent of the consortium of lenders, and the 3rd defendants agreed that all proceeds of the sale of the apartment units of the complex were to be paid into a special account in favour of the 2nd defendants who held the proceeds in trust for the consortium of lenders, the 1st defendants and 3rd defendants. The 2nd defendants were authorised to make payments from the special account to all parties named in the sharing formula agreement which included the plaintiffs whenever the amount in the special fund exceeded RM50,000. The plaintiffs were, according to them, entitled to be paid the sum of RM8.5 million (i.e. the sum of RM8.5 million on account of previous work done and another sum of RM3.5 million for the new work carried out by the plaintiffs in completing the complex) under the special account. However after executing the sharing formula agreement with the 1st defendants the 2nd defendants realised that the 1st defendants had utilised a sum in excess of RM2 million. Upon acquiring this information the 2nd defendants therefore put pressure on the plaintiffs to accept a reduced sum which the plaintiffs had no alternative but to accept a payment in the sum of RM2.619 million since they were keen to get some payment. The plaintiffs therefore averred that the 2nd and 3rd defendants had by the use of undue pressure influence and inequality of bargaining positions extracted a letter dated 3 July 1987 from the plaintiffs indicating their agreement to accept the lesser sum. They therefore claimed a sum of RM5.881 million as the balance sum due to them under the lump sum agreement read with the sharing formula agreement.

At the hearing of the application of the 2nd defendants to strike out the statement of claim and dismiss the action against them, Counsel for the 2nd defendant unequivocably said that they were grounding their application solely on the contention that the statement of claim disclosed no reasonable cause of action. That being the case I must bear in mind two legal principles relating to such a contention. First it is statutorily provided that in striking out a statement of claim on such ground no affidavit evidence is admissible. Second a reasonable

cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in *Drummond-Jackson v. British Medical Association* [1970] 1 WLR 688. So long as the statement of claim discloses some cause of action or raises some question fit to be decided by the Court, the mere fact that the case is weak is no ground for striking out - see *Wenlock v. Moloney* [1965] 1 WLR 1238 and *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd.* [1984] 1 CLJ (Rep) 211. Now the cause of action relied on by the plaintiffs could well be under misrepresentation proferred by the 2nd defendants causing the plaintiffs to suffer a loss amounting to millions of ringgit. This, to my mind, is a tortious act on the part of the 2nd defendants. Furthermore in inducing the plaintiffs to complete the construction of the complex would to my mind create a *quasi* contractual relationship between the 2nd defendant and the plaintiffs pursuant to s. 71 of the Contracts Act 1950 particularly when it is for the benefit of the consortium lenders that the project should be completed. Under the circumstances it cannot be gainsaid that the statement of claim does disclose some question fit to be adjudicated. In any case the claim of the plaintiffs against the 2nd defendant is not a sham and frivolous claim. I am not at all satisfied that the 2nd defendants are entitled to relief (ii) as sought pursuant to their application of 6 September 1988. I therefore must reject the 2nd defendants' application to strike out the statement of claim and dismiss the plaintiffs' action against them.

I shall now advert to the 3rd defendants' application to strike out the plaintiffs' statement of claim and to dismiss their action against the 3rd defendants. It is to be noted that the 3rd defendants were not relying on the fact that the plaintiffs had no cause of action against them but they were also relying on the fact that the action of the plaintiffs was frivolous, vexatious and an abuse of the process of the Court. By their statement of defence they admitted that they were a party to the sharing formula agreement but they denied that they had induced the plaintiffs to complete the complex and to suspend the levying execution of the judgment obtained by the plaintiffs against the 1st defendants. Since they were also party to the sharing formula agreement their position is not unlike that of the consortium of lenders. The 3rd defendants as a party to the sharing formula agreement were also instrumental in inducing the plaintiffs to complete the complex and to suspend the execution of the judgment which they had obtained against the 1st defendants. The plaintiffs have therefore an action in tort or *quasi* contract against the 3rd defendants. In arriving at this conclusion I am not unmindful of the 3rd defendants' contention that they had in any case terminated the sharing formula agreement as at 2 February 1988 (see affidavit filed on behalf of the 3rd defendants - encl. 32). But the termination was made **after** the plaintiffs' cause of action against the 3rd defendants had accrued in late 1987 when the parties to the sharing formula agreement refused to pay the plaintiffs from the special account. The 3rd defendants are therefore in the same boat as the consortium of lenders and the 2nd defendants were at the material time acting as agent for the 3rd defendants. It cannot be gainsaid that the plaintiffs have raised a question fit to be, decided by the Court. I must likewise reject the 3rd defendants application to strike out the statement of claim of the plaintiffs and to dismiss the plaintiffs' action against them.

Costs of this striking out proceedings are to be paid by the 2nd and 3rd defendants to the plaintiffs.

Also found at [1991] 1 CLJ 776